No. 93121

In the
Missouri Supreme Court

TRAVIS STANLEY,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Perry County Circuit Court
The Honorable Benjamin F. Lewis, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF FACTS

Appellant, Travis M. Stanley, was charged by information in the Circuit Court of Perry County with the class D felony of failing to register a change of address as a sex offender (LF 41-42). On February 5, 2010, appellant appeared before the Honorable Benjamin Lewis in the Circuit Court of Perry County and filed a petition to enter a plea of guilty (LF 40).

In his petition, appellant acknowledged that he failed to advise the Perry County Sheriff's Department of his address within 3 days of moving (LF 43). Appellant understood that the range of punishment was up to four years imprisonment or up to 12 months in the county jail, or a fine not exceeding $5,000 (LF 44). Appellant acknowledged that no one had promised or suggested that he would receive a lighter sentence, or probation, or any other form of leniency if he pled guilty (LF 44). Appellant asserted that the prosecutor would recommend a cap of 3 years on this case and another case, but appellant was free to request probation (LF 44). Appellant said that if anyone had made any promises or suggestions, they had no authority to do so (LF 45). Appellant understood that the sentence he received would be solely within the control of the judge, and that he was prepared to accept any punishment permitted by law which the trial court saw fit to impose (LF 45). Appellant asserted that he offered his plea freely and voluntarily with a full

understanding of everything set forth in the information and the petition to plead guilty (LF 46).

Counsel also provided a signed certificate asserting that she had fully explained the charged allegations to appellant, that appellant's declarations in the petition were accurate and true, and that counsel had explained the range of punishment to appellant (LF 47).

At the plea hearing, appellant acknowledged that he had no problem reading, writing, or understanding the English language (LF 50). He was not under the influence of drugs or alcohol (LF 50). He understood the charges (LF 50). He understood that he had a right to take the case to trial (LF 51). No one had promised appellant anything other than the plea agreement to get him to plead guilty (LF 51). No one had threatened him to get him to plead (LF 51).

The prosecutor explained that in exchange for appellant's plea, the state had agreed to a cap of three years combined on two separate sentences (LF 51). The prosecutor said that he thought appellant knew that the state would ask for three years on each case, but that appellant would be free to argue for less, including probation (LF 51). Appellant acknowledged that this was his understanding (LF 52).

There was some debate about whether the crime was a class C or a class D felony (LF 52). The prosecutor agreed to stipulate that the maximum

range was four years (LF 53). Appellant said that he understood that the prosecutor agreed that the maximum sentence that could be imposed was four years (LF 53).

The court observed that the parties had agreed to stipulate that the maximum punishment on both offenses was four years, and that therefore the maximum the court could possibly impose was eight years (LF 53). The court observed that it was not saying it would do that, but it could not promise that it wouldn't (LF 53). Appellant said that he understood (LF 53). The court explained that it would order a sentencing assessment report (LF 54). Appellant again said that he understood that he could be facing eight years (LF 54). Appellant said that it was still his intention to plead guilty (LF 54).

The court then explained to appellant all of the rights that accompanied his right to take the case to trial (LF 54-56). Appellant understood those rights (LF 54-56). Appellant understood that by pleading guilty he was giving up those rights (LF 56). Appellant indicated that he was satisfied with counsel and her representation (LF 56).

The court then explained that appellant was charged with the class D felony of failing to register as a sex offender in that on or about June 10, 2009, he lived in Perry County and, having registered as a sex offender on February 9, 2009, he failed to verify his information within 90 days of that

date with the Perry County Sheriff (LF 57). Appellant acknowledged that he had previously been convicted of statutory sodomy and that he was required to register as a sex offender (LF 57-58).

In the other case, the court explained that appellant was charged with failing to register a change of address, in that on or about February 4, 2009, appellant failed to advise the Perry County Sheriff, in writing and in person, of his new address within three days of moving (LF 58). Appellant acknowledged that he had moved and failed to tell the sheriff (LF 59).

The trial court found a factual basis for appellant's pleas and found that his pleas were entered freely, knowingly, voluntarily, and intelligently (LF 60).

On March 5, 2010, appellant appeared for sentencing (LF 61). The state recommended concurrent sentences of three years (LF 61). Appellant requested probation (LF 62). The court said, "When I sentenced Mr. – when I accepted the plea, that was under our usual plea rules, correct?" (LF 62). Defense counsel said that it was (LF 62). The trial court sentenced appellant to consecutive terms of four years (LF 39, 64, 66-68).

Appellant timely filed a *pro se* motion for postconviction relief under Rule 24.035 (LF 4, 6-12). Counsel subsequently filed an amended motion on appellant's behalf (LF 3, 15-17). Andrew R. Tarry, appellant's initial counsel, subsequently filed a motion to withdraw (LF 3). Scott Thompson made an

entry of appearance for appellant on April 13, 2011 (LF 2). Mr. Thompson made an oral motion to file a second amended motion, which was granted (LF 2. The second amended motion was filed on July 21, 2011 (LF 2). Appellant's second amended motion was denied without a hearing (LF 1, 32-33).

The Court of Appeals, Eastern District, reversed and remanded the motion court's ruling. ***Stanley v. State***, No. ED97795 (Mo.App.E.D., December 4, 2012). This Court took transfer of this appeal pursuant to Supreme Court Rules 30.27 and 83.04.

ARGUMENT

I.

The motion court did not clearly err in denying appellant's claims as pled in his Second Amended Motion because that motion was not properly before the motion court.

The motion court did not clearly err in denying appellant's claims as pled in his Second Amended Motion. Appellant's Second Amended Motion was not properly before the motion court as it was untimely and there was no basis to find that appellant was abandoned by his counsel who filed the first amended motion.

A. Appellant's Second Amended Motion was Untimely.

The Second Amended Motion on which the motion court ruled was not properly before the motion court. According to Rule 24.035(g), the amended motion shall be filed within sixty days of the earlier of: (1) the date both a complete transcript consisting of the guilty plea and sentencing hearing has been filed in the trial court and counsel is appointed or (2) the date both a complete transcript has been filed in the trial court and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant.

In the present case, counsel was appointed on April 30, 2010 (LF 3, 5). Andrew R. Tarry made an entry of appearance on appellant's behalf on July

22, 2010 (LF 3). The transcript was filed on August 9, 2010 (LF 3). Per Rule 24.035(g), counsel had 60 days from August 9 – until October 8, 2010 – to file the amended motion. And in fact, Mr. Tarry filed an amended motion on September 30, 2010, well within the time limits (LF 3, 15-17).

On December 10, 2010, Mr. Tarry filed a motion to withdraw (LF 3). Mr. Tarry was allowed to withdraw from the case on January 7, 2001 (LF 3). Scott Thompson of the public defender's office made an entry of appearance on appellant's behalf on April 13, 2011 (LF 2). On July 21, 2011, Mr. Thompson filed a second amended motion on appellant's behalf (LF 2). On July 22, 2011, Mr. Thompson made an oral motion to file the second amended motion, which was granted (LF 2, 3).

The filing of the second amended motion was well outside the time limits of filing an amended motion, even if the court had granted appellant a thirty day extension, as provided in Rule 24.035(g). The time limits of Rule 29.15 are valid and mandatory. ***Swofford v. State***, 323 S.W.3d 60, 62 (Mo.App.E.D. 2010), *citing* ***Day v. State***, 770 S.W.2d 692, 692 (Mo.banc 1989). Courts are without authority to extend time limits beyond those set forth in the rule. ***Swofford, supra; Manuel v. State***, 351 S.W.3d 240, 242 (Mo.App.E.D. 2011). A motion court has no authority to extend the deadline for filing an amended motion beyond that allowed by Rule 24.035 or 29.15. ***Riley v. State***, 945 S.W.2d 21, 23 (Mo.App.E.D. 1997). ***See State v. Isaiah***,

874 S.W.2d 429, 435 (Mo.App.W.D. 1994) (finding that motion court erred in allowing movant to file second amended motion outside the time limits). "Arguments raised for the first time in an untimely second amended motion are waived and cannot be considered on appeal." ***Oliver v. State,*** 196 S.W.3d 643, 645 (Mo.App.S.D. 2006) (holding that postconviction claims raised in an untimely filed second amended motion would not be considered); *see also* ***Edgington v. State,*** 869 S.W.2d 266, 269 (Mo.App.W.D. 1994) (holding that Rule 24.035 does not permit the filing of an untimely second amended motion after the 30-day extension to file an amended motion had been granted and a timely amended motion filed. ***See also Norville v. State***, 83 S.W.3d 112, 114 (Mo.App.S.D. 2002) (holding that the motion court had no authority to grant relief on a postconviction claim raised in an untimely supplemental motion filed after the amended motion); ***State v. Six***, 805 S.W.2d 159, 169-70 (Mo.banc 1991) (holding that Rule 29.15 does not permit the filing of a second- or third-amended post-conviction motion after the timely-filed initial amended motion); ***State v. Brooks***, 960 S.W.2d 479, 498-99 (Mo.banc 1997) (holding that "[s]upplementary Rule 29.15 pleadings" filed after the filing of an amended motion and "that are filed outside of the valid and mandatory time limits will not be reviewed."). Thus, appellant's second amended motion was not permissible under the rules, was untimely, and was thus a nullity.

Any hearing on appellant's claims "shall be confined to the claims contained in the last timely filed motion." Rule 24.035(i). The last timely filed motion in the present case was the first amended motion filed by appellant's initial appointed counsel. Thus the motion court only had the authority to consider appellant's claims as pled in the first amended motion.

B. Appellant was not abandoned.

There are, of course, limited exceptions to the timeliness requirements where it is determined that a movant was abandoned by post-conviction counsel. This Court has recognized that "abandonment" by post-conviction counsel can occur in three limited contexts: (1) when post-conviction counsel takes no action with respect to filing an amended motion, thus depriving the movant of a meaningful review of his claims; (2) when post-conviction counsel is aware of the need to file an amended motion but fails to do so in a timely manner; and (3) "where postconviction counsel overtly acts in a way that prevents the movant's timely filing of a postconviction motion." ***Gehrke v. State***, 280 S.W.3d 54, 57 (Mo.banc 2009). But none of these contexts exist in the present case. Mr. Andrew R. Tarry made an initial entry of appearance on appellant's behalf on July 22, 2010 (LF 3) and timely filed an amended motion on appellant's behalf on September 30, 2010 (LF 3, 15-17). The time for filing an amended motion ran until October 8, 2010 (LF 3; Rule 24.035(g)). Mr. Tarry did not abandon appellant as he acted on appellant's behalf, timely

filed an amended motion, and did not overtly act in a way that prevented appellant from timely filing his initial postconviction motion. Thus, appellant had a timely filed amended motion and was not abandoned by counsel.

Nor could appellant have been abandoned by Mr. Thompson, his second attorney, because there was no basis for the motion court to allow Mr. Thompson to file a second amended motion for appellant. The postconviction rules make no such provision, and in fact, the rules expressly state that "[t]he circuit court shall not entertain successive motions." Supreme Court Rule 24.035(*l*). *See also* ***Edgington v. State,*** 869 S.W.2d 266, 269 (Mo.App.W.D. 1994) (holding that Rule 24.035 does not permit the filing of an untimely second amended motion after the 30-day extension to file an amended motion had been granted and a timely amended motion filed); ***State v. Six***, 805 S.W.2d 159, 169-70 (Mo.banc 1991) (holding that Rule 29.15 does not permit the filing of a second- or third-amended post-conviction motion after the timely-filed initial amended motion); ***State v. Brooks***, 960 S.W.2d 479, 498-99 (Mo.banc 1997) (holding that "[s]upplementary Rule 29.15 pleadings" filed after the filing of an amended motion and "that are filed outside of the valid and mandatory time limits will not be reviewed.").

Nor can either the motion court or the court of appeals extend the time limits of Rule 24.035. ***Wilkins v. State***, 802 S.W.2d 491, 504 (Mo.banc

1991). Rather, the time limits of Rule 24.035 are valid and mandatory, ***Swofford v. State***, 323 S.W.3d 60, 62 (Mo.App.E.D. 2010), *citing* ***Day v. State***, 770 S.W.2d 692, 692 (Mo.banc 1989). Courts are without authority to extend time limits beyond those set forth in the rule, ***Swofford, supra; Manuel v. State***, 351 S.W.3d 240, 242 (Mo.App.E.D. 2011); and a motion court has no authority to extend the deadline for filing an amended motion beyond that allowed by Rule 24.035 or 29.15. ***Riley v. State***, 945 S.W.2d 21, 23 (Mo.App.E.D. 1997).

Moreover, appellant could not have been abandoned by Mr. Thompson because the concept of "abandonment" in postconviction proceedings is based upon counsel's failure to comply with the requirements of the postconviction rules. Abandonment by post-conviction counsel means conduct that is tantamount to "a total default in carrying out the obligations imposed upon appointed counsel" under the rules. ***Russell v. State***, 39 S.W.3d 52, 54 (Mo.App.E.D. 2001), *citing* ***State v. Bradley***, 811 S.W.2d 379, 384 (Mo.banc 1991). No abandonment could have occurred in the present case because Mr. Tarry complied with the rules, and Mr. Thompson had no obligation to comply with the rules regarding filing of an amended motion, inasmuch as an amended motion had already been timely filed and Mr. Thompson did not even enter the case until after the time for filing an amended motion had run.

Appellant, in his substitute brief before this Court, observes that the State did not object to the filing of the second amended motion in the circuit court below (App.Br. 14). This failure to object is of no account. In ***Dorris v. State***, 360 S.W.3d 260, 268 (Mo.banc 2012), this Court held that it is the court's duty to enforce the mandatory time limits and the resulting complete waiver in the postconviction rules even if the State does not raise the issue. The Missouri Constitution vests the Missouri Supreme Court with authority to establish rules relating to practice, procedure and pleadings for all courts. ***Id.,*** *citing* Mo.Const. Art. V, Sec. 5. When the rules of court are properly adopted, said rules are binding on the courts, litigants, and counsel, and it is the court's duty to enforce them. ***Id.*** The State cannot waive noncompliance with the time limits in Rules 29.15 and 24.035. ***Id.*** As this Court noted in ***Dorris***, postconviction relief proceedings "were not designed for 'duplicative and unending challenges to the finality of a judgment.'" ***Id.*** at 269, *quoting* ***State ex rel. Simmons v. White***, 866 S.W.2d 443, 466 (Mo.banc 1993). The Rules do not provide a right for any party, but rather create a procedure for a postconviction relief system which, at least in part, is concerned with preserving the finality of judgment. ***Id.*** at 270. In order to preserve the purpose of these Rules, the State may not waive the requirement that movants timely file. ***Id.***

Appellant appears to suggest that he was "abandoned" by Mr. Tarry because he filed a motion "so patently defective as to amount to a nullity," and that the only remedy for such abandonment is the filing of a second amended motion (App.Br. 15). Appellant does not specify what was allegedly wrong with the amended motion filed by Mr. Tarry.

Appellant cites to ***Trehan v. State***, 835 S.W.2d 427, 429-430 (Mo.App.S.D. 1992), but ***Trehan*** is inapposite. In ***Trehan***, counsel filed an unverified[1] amended motion, out of time, that merely incorporated the allegations of the movant's *pro se* motion. The *pro se* motion consisted of a Form 40 that did not include any allegations whatsoever in Paragraph 9, which was supposed to state the facts that supported the grounds for relief stated in paragraph 8. ***Id.*** at 29. Notwithstanding the patent insufficiency, counsel incorporated the *pro se* motion into the amended motion but did nothing to amend the allegations in the *pro se* motion. The Southern District determined that counsel had not complied with the requirements of the postconviction rules because the movant's *pro se* motion was patently inadequate as it included only recitals of conclusions unsupported by fact and

[1] At that time, postconviction motions were required to be verified under Rule 24.035(f).

counsel did nothing whatsoever to amend the *pro se* motion but merely incorporated it as is. ***Id.*** at 429.

Such is not the case in the present matter. While Mr. Tarry purported to incorporate appellant's *pro se* motion[2] into the timely filed amended motion, Mr. Tarry expressly stated as follows:

> 2. Paragraphs 8 & 9 of Movant's Pro Se Motion to Vacate, Set Aside or Correct the Judgment or Sentence *is hereby amended to add the following allegations* and is not intended or meant in any way to subtract from those allegations previously made.

(LF 15). Mr. Tarry then set out the circumstances of appellant's plea and alleged that counsel was ineffective for failing to "accurately state the plea agreement," for failing to explain that the trial court was free to reject the plea, and for failing to object to the consecutive four-year sentences, and that the trial court violated Rule 24.02(d)(4) by failing to inform the parties that it rejected their plea agreement and by failing to allow appellant the

[2] In his *pro se* motion, appellant pled that he had been promised a sentence of probation to three years, and that counsel allowed his plea to be an open plea (LF 7). Appellant pled that he had no knowledge the plea would be open and the plea bargain was never rejected in open court (LF 12).

opportunity to withdraw his plea (LF 16-17). Unlike the counsel in ***Trehan***, the record herein reflects that counsel ascertained whether sufficient facts were asserted in the *pro se* motion and whether all claims known to appellant were pled, and he filed an amended motion to allege additional facts and claims.

Similarly, ***Pope v. State***, 87 S.W.3d 425 (Mo.App.W.D. 2002), on which appellant relies, is inapposite. In ***Pope***, counsel filed an amended motion that merely replicated Pope's *pro se* motion except for minor grammatical changes. ***Id.*** at 427. The Court of Appeals, Western District, found that based on the fact that Pope's amended motion merely replicated his *pro se* motion, the Court was unable to determine whether appointed counsel had determined that the motion was sufficiently supported by facts and included all claims known to Pope. ***Id.*** at 429.

But in the present case, the record reflects that Mr. Tarry did take steps as required under Rule 24.035 to present appellant's postconviction claims to the motion court. Mr. Tarry filed an amended motion that not only incorporated appellant's *pro se* motion but also amended the allegations and raised additional claims.

Appellant appears to argue that he was abandoned because Mr. Tarry failed to include, amend, and support a post-conviction claim – without specifically identifying what the claim was or how the first amended motion

was insufficient (App.Br. 16). But it is well settled that counsel's failing to include claims in a post-conviction motion is not abandonment. "These are not claims of abandonment and are instead general claims of ineffective assistance of counsel." *See* ***Hankins v. State***, 302 S.W.3d 236, 238-239 (Mo.App. S.D. 2009); ***Morgan v. State***, 296 S.W.3d 1, 3-4 (Mo.App. E.D. 2009) (assertion that "counsel failed to set forth sufficient facts to warrant relief" was not a claim of abandonment); ***Edgington v. State***, 189 S.W.3d 703, 706-707 (Mo.App. W.D. 2006) (assertion that "post-conviction counsel was deficient for failing to raise an additional claim of ineffective assistance of appellate counsel and that such failure was due to the alleged conflict that existed between appellate and post-conviction counsel" was not a claim of abandonment). Assuming that counsel left out an allegation of fact or a claim, this would only constitute ineffective assistance of counsel, not abandonment. Claims of ineffective assistance of postconviction counsel are categorically unreviewable. ***Gehrke v. State***, 280 S.W.3d 54, 57 (Mo.banc 2009), *citing* ***Hutchison v. State***, 150 S.W.3d 292, 303 (Mo.banc 2004).

Appellant also notes that Rule 24.035(f) allows for withdrawal of counsel (App.Br. 16). But Rule 24.035(f), while allowing for new counsel to be appointed, does not abrogate the time requirements for filing an amended brief. And indeed, to allow a movant to avoid the timing and pleading requirements of the postconviction rules simply by obtaining new counsel

would defeat the purpose of postconviction proceedings, which "were not designed for 'duplicative and unending challenges to the finality of a judgment.'" ***Dorris,*** at 269, *quoting* ***State ex rel. Simmons v. White***, 866 S.W.2d 443, 466 (Mo.banc 1993).

Similarly, appellant contends that multiple *pro se* motions are prohibited, but multiple amended motions are not, citing Rule 24.035(*l*) (App.Br. 17). But the law does not allow the amended motion to be amended or supplemented with new or additional allegations beyond the deadline set by the post-conviction rules. Moreover, Rule 24.035(*l*) states, "The circuit court shall not entertain successive motions." It does not differentiate between *pro se* and amended motions. The Rules provide for a *pro se* motion and a timely filed amended motion. There are no provisions for successive *pro se* or amended motions. And again, allowing successive amended motions would only serve to defeat the purposes of postconviction proceedings, which "were not designed for 'duplicative and unending challenges to the finality of a judgment.'" ***Dorris, supra.*** The circumstances appellant cites in his brief wherein a successive motion was allowed – involving abandonment or a limited postconviction motion to address resentencing (App.Br. 17) – are not applicable here, and amended motions are allowed in those cases because the movants were essentially denied any postconviction review whatsoever because there had essentially been *no* prior amended motion. Such is not the

case in the present matter where appointed counsel filed an amended motion on appellant's part.

Appellant also suggests that circuit courts "may deviate from the letter of the post-conviction rules in the interest of justice." (App.Br. 17). Appellant cites to cases wherein the movant's motion was considered timely filed despite having been filed in the wrong circuit or because of delay occasioned by the prison mailroom (App.Br. 17). But cases such as ***Carter v. State***, 181 S.W.3d 78 (Mo.banc 2006); and ***Nicholson v. State***, 151 S.W.3d 369 (Mo.banc 2004), are inapposite. They do not stand for the proposition that a circuit court may simply ignore the postconviction rules when it seems suitable. Rather, those cases dealt with very rare, fact-specific scenarios where this Court determined that the Rules in fact excused the late filing (see, e.g., ***Nicholson v. State***, ***supra*** wherein this Court found that Rule 51.10 provided that the case should have been transferred to the proper venue and treated as timely filed) or where the Rules allow the lack of a signature on a *pro se* motion to be excused by a signed amended motion (see, e.g., ***Carter v. State,*** 181 S.W.3d 78, 79-80 (Mo.banc 2006).

In the present case, appellant cannot cite any rule or authority that allows him to file a second amended motion when the first amended motion was timely filed by counsel. The mere fact that appellant may have been unhappy with the first amended motion does not mean he may continue to

file amended motions until one meets his satisfaction. And to the extent anything may have been faulty about the first amended motion (and appellant does not, with any specificity, indicate what that is), this would only be a claim of ineffective assistance of postconviction counsel. This Court has repeatedly held it will not expand the scope of abandonment to encompass perceived ineffectiveness of post-conviction counsel. ***Gehrke v. State***, 280 S.W.3d 54, 57 (Mo.banc 2009), *citing* ***Barnett v. State***, 103 S.W.3d 765, 774 (Mo.banc 2003). Claims of ineffective assistance of postconviction counsel are categorically unreviewable. ***Gehrke, supra***, *citing* ***Hutchison v. State***, 150 S.W.3d 292, 303 (Mo.banc 2004).

In sum, appellant's Second Amended Motion was not properly before the motion court, and thus the motion court could not have clearly erred in denying any claim raised therein.

II.

The motion court did not clearly err in denying, without an evidentiary hearing, appellant's claim that the trial court failed to tell him he could not withdraw his plea if the court refused to follow the plea agreement (In response to appellant's point I).

Appellant argues that he was denied due process because the trial court failed to inform him that he could not withdraw his guilty plea if the trial court refused to accept the plea agreement and sentenced him to the maximum possible sentence (App.Br. 14). Appellant asserts that he reasonably believed that the plea agreement was a binding plea agreement, and the court failed to ensure that he understood that the agreement was actually a mere recommendation (App.Br. 14).

A. Standard of review.

Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are "clearly erroneous." ***Woods v. State***, 176 S.W.3d 711, 712 (Mo.banc 2005). Supreme Court Rule 24.035(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. ***Id.*** On review, the motion court's findings and conclusions are presumptively correct. ***Storey v. State***, 175 S.W.3d 116, 125 (Mo. banc 2005).

To show ineffective assistance of counsel, appellant must show that his counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances," ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and that he was prejudiced by his counsel's failure to competently perform. ***Id.*** Prejudice exists when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. ***Strickland,*** 466 U.S. at 694, 104 S.Ct. at 2068. The benchmark for judging ineffectiveness is whether counsel's conduct so undermined the adversarial process that the trial cannot be relied upon as having produced a just result. ***Deck v. State***, 68 S.W.3d 418, 425 (Mo.banc 2002).

Where a defendant pleads guilty, claims of ineffective assistance of counsel are only relevant as they affect the voluntariness and understanding with which the plea was made. ***Hicks v. State***, 918 S.W.2d 385, 386 (Mo.App. E.D. 1996). To show prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. ***State v. Coates***, 939 S.W.2d 912, 914 (Mo.banc 1997).

The motion court is not required to grant a movant an evidentiary hearing unless (1) the movant pleads facts, not conclusions, which if true would warrant relief, (2) the facts alleged are not refuted by the record, and

(3) the matters complained of resulted in prejudice to the movant. ***Coates v. State***, 939 S.W.2d at 913. The purpose of an evidentiary hearing is not to provide movant with an opportunity to produce facts not alleged in the motion, but is to determine if the facts alleged in the motion are true. ***White v. State***, 939 S.W.2d 887, 904 (Mo. banc 1997), *cert. denied*, 522 U.S. 948, 118 S. Ct. 365, 139 L. Ed. 2d 284 (1997).

B. Relevant facts.

1. The plea.

Appellant filed a petition to enter a plea of guilty, in which he asserted that he understood that the range of punishment was up to four years imprisonment (LF 44). Appellant acknowledged that no one had promised or suggested that he would receive a lighter sentence, or probation, or any other form of leniency if he pled guilty (LF 44). Appellant asserted that the prosecutor would recommend a cap of 3 years on this case and another case, but appellant was free to request probation (LF 44). Appellant said that if anyone had made any promises or suggestions, they had no authority to do so (LF 45). Appellant understood that the sentence he received would be solely within the control of the judge, and that he was prepared to accept any punishment permitted by law which the trial court saw fit to impose (LF 45). Appellant asserted that he offered his plea freely and voluntarily with a full

understanding of everything set forth in the information and the petition to plead guilty (LF 46).

Counsel also provided a signed certificate asserting that she had fully explained the charged allegations to appellant, that appellant's declarations in the petition were accurate and true, and that counsel had explained the range of punishment to appellant (LF 47).

At the plea hearing, appellant acknowledged that no one had promised appellant anything other than the plea agreement to get him to plead guilty (LF 51). The prosecutor explained that in exchange for appellant's plea, the state had agreed to a cap of three years combined on two separate sentences (LF 51). The prosecutor said that he thought appellant knew that the state would ask for three years on each case, but that appellant would be free to argue for less, including probation (LF 51). Appellant acknowledged that this was his understanding (LF 52). Appellant said that he understood that the prosecutor agreed that the maximum sentence that could be imposed was four years (LF 53). The court observed that the maximum punishment on both offenses was four years, and that therefore the maximum the court could possibly impose was eight years (LF 53). The court observed that it was not saying it would do that, but it could not promise that it wouldn't (LF 53). Appellant said that he understood (LF 53). The court explained that it would order a sentencing assessment report (LF 54). Appellant again said that he

understood that he could be facing eight years (LF 54). Appellant said that it was still his intention to plead guilty (LF 54).

On March 5, 2010, appellant appeared for sentencing (LF 61). The state recommended concurrent sentences of three years (LF 61). Appellant requested probation (LF 62). The court said, "When I sentenced Mr. – when I accepted the plea, that was under our usual plea rules, correct?" (LF 62). Defense counsel said that it was (LF 62). The trial court sentenced appellant to consecutive terms of four years (LF 39, 64, 66-68).

2. Postconviction pleadings.

In his *pro se* Rule 24.035 motion, which was purportedly incorporated into his First Amended Motion,[3] appellant pled that he was promised a sentence of probation to 3 years, but when he got to court, "this plea was not rejected in open court." (LF 7). In an attached letter to Judge Lewis, appellant asserted that at the plea hearing, the prosecutor "began to precede [sic] with an Open Plea, I had no knowledge that, My plea would be Open, the plea bargain was never rejected in Open Court." (LF 12).

[3] According to appellant's First Amended Motion, the pro se motion was "attached hereto and incorporated by reference" (LF 15), but the legal file itself does not indicate that the pro se motion was, in fact, physically attached to the First Amended Motion.

In his First Amended Motion, appellant alleged that the court violated Rule 24.02(d)(4) when it failed to inform the parties that it rejected their plea agreement (LF 16). Appellant further pled that the court violated Rule 24.02(d)(4) when it failed to afford appellant the opportunity to withdraw his plea after the court rejected the plea agreement (LF 16).[4]

3. Motion court findings.

The motion court found that appellant's claim was refuted by the record (LF 32-33).

C. Analysis.

The motion court did not clearly err in denying appellant's motion without an evidentiary hearing. Appellant's claim was refuted by the record and appellant has not pled facts demonstrating prejudice.

Appellant, in his amended motion, relied on Rule 24.02(d)(4), which states that if the trial court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant that the court is not bound by the plea agreement, and afford the defendant an opportunity to then withdraw the plea (App.Br. 18). But that particular provision of Rule 24.02 is not applicable in the present case because the trial court did not

[4] Inasmuch as Appellant's Second Amended Motion was untimely (as discussed ***supra***) appellant's pleadings therein are immaterial to this claim.

reject the plea agreement; on the contrary, appellant made a plea as provided for in Rule 24.02(d)(1)(B), wherein the state agreed to make a recommendation with the understanding that such recommendation shall not be binding on the court. Rule 24.02(d)(4), by its express terms, does not apply to a plea agreement made pursuant to Rule 24.02(d)(1)(B).[5]

In his present brief, appellant has abandoned the argument he made in his motion and below at the Court of Appeals and now argues that appellant's guilty plea agreement "apparently" was a non-binding agreement and thus the plea court erred in not assuring that appellant knew he could not withdraw his plea (App.Br. 19).

The plea agreement, as set out in appellant's Petition to Enter Plea of Guilty, stated that the prosecutor, in exchange for appellant's plea, would

[5] Rule 24.02(d)1 provides that the parties may reach an agreement that the prosecutor will (A) dismiss other charges; (B) make a recommendation for a particular disposition with the understanding that the recommendation is not binding on the court; (C) agree that a specific sentence is the appropriate disposition of the case; or (D) make a recommendation for another appropriate disposition. Given the totality of the facts in this case as reflected in the record, appellant's plea agreement appears to fall under subparagraph (B).

recommend a cap of three years on both cases, but appellant was free to request probation (LF 44). In his written plea, appellant asserted that he knew that the sentence he received was solely a matter within the control of the judge (LF 45). Appellant was prepared to accept any punishment permitted by law which the court saw fit to impose (LF 45). Appellant acknowledged that no one had made any promises or suggestions other than that noted in the Petition (LF 45). The written petition made it clear that appellant knew he had not made a plea agreement for a particular sentence. Rather, he had made an agreement that the state would make a recommendation (a cap of three years), but that recommendation was not binding on the court, inasmuch as appellant knew that sentencing was totally within the court's discretion and appellant was "prepared to accept any punishment permitted by law which the Court sees fit to impose." (LF 45).

And the record at the plea hearing (in addition to appellant's written petition) made it clear that appellant knew the state had made a non-binding recommendation. The prosecutor stated the agreement to the court as follows:

> Judge, the State has agreed to a cap of three years combined on these two sentences. I think the defendant knows we're going to ask for three years in each case concurrent.

They're going to be free to argue for lesser including probation. I believe that's our agreement, sir.

(LF 51). Appellant said that was his understanding (LF 51-52). In addition, the following colloquy occurred:

Q. (By the Court) . . . . That means the maximum that I could possibly impose would be eight. Now, I'm not saying I'm going to do that, but today I can't promise that I won't. Do you understand that?

A. Yes, sir.

Q. Because what I need to find out is what's going on with you and what's going on – what are the exact circumstances of these charges and we're not set up to do that today. I'm going to order a sentencing assessment report, bring you back here in March and then I'll know and we'll all talk about it. Do you understand that?

A. Yes, sir.

Q. But it could be as much as eight years. Do you understand that?

A. Yes, sir.

Q. *Understanding that, is it still your intention to plead guilty to these charges?*

A. *Yes, sir.*

(LF 53-54) (emphasis added). The totality of the plea hearing, in addition to appellant's petition, demonstrated that appellant knew that the state was merely making a recommendation and the trial court was not limited by the recommendation. In his petition, appellant expressly stated he knew that the sentence he received was solely a matter within the control of the judge, and that he was prepared to accept any punishment permitted by law which the court saw fit to impose (LF 45). At his plea hearing, appellant expressly stated that he understood that the trial court could sentence him to as much as eight years, but it was still his intention to plead guilty. These statements refute any notion that appellant thought he had a binding plea agreement for three years on each case and that he was pleading guilty in reliance on this belief.

Moreover, the plea agreement was carried out. The state, per the agreement, recommended three-year sentences on both cases (LF 61). Defense counsel, per the agreement, requested probation (LF 62). And while the court did not sentence appellant per the recommendation, the court was not required to afford appellant the opportunity to withdraw his plea under Rule 24.02(d)(4).

Rule 24.02(d)(4) provides, in pertinent part, as follows:

> If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court . . . that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw defendant's plea if it is based on an agreement pursuant to Rule 24.02(d)(1)(A), (C), or (D) . . . .

But appellant's plea, as discussed above, was made under Rule 24.02(d)(1)(B). Thus, Rule 24.02(d)(4) is not applicable.

That being said, the court *was* required to tell appellant that his plea could not be withdrawn if the court did not adopt the state's recommendation or appellant's request. Rule 24.02(d)(2) expressly states that if the agreement is pursuant to Rule 24.02(d)(1)(B), the court "shall advise" the defendant that the plea cannot be withdrawn if the court does not adopt the state's recommendation. The record does not reflect that the court ever advised appellant that his plea could not be withdrawn.

But appellant failed to raise that issue in his motion. Appellant's motion asserted only that the court failed to apply Rule 24.02(d)(4), which as discussed above, is not applicable. Appellant did not plead that the court was required to advise him under Rule 24.02(d)(2). As this claim was not raised in his motion, it is waived. The postconviction motion must contain all claims, and those not raised in the motion are waived. ***Hoskins v. State***, 329

S.W.3d 695, 699 (Mo.banc 2010); ***Lebbing v. State***, 242 S.W.3d 761, 769-770 (Mo.App.S.D. 2008) (Refusing to consider claim that was not raised in movant's last timely filed motion); ***Barnett v. State***, 103 S.W.3d 765, 773 (Mo.banc 2003) (holding that claim that was not raised to motion court was procedurally barred on appeal as under Rule 29.15, a movant waives all claims not raised in a timely filed pleading).

In any event, regardless of whether appellant's plea was a binding or non-binding plea agreement and regardless of whether the trial court was to advise appellant that his plea could not be withdrawn, appellant is not entitled to relief because appellant has failed to plead prejudice in this matter. Unlike some other civil pleadings, courts will not draw factual inferences or implications in a postconviction motion from bare conclusions or from a prayer for relief. ***Barnett v. State***, 103 S.W.3d 765, 769 (Mo.banc 2003). Appellant did not plead that, had he known he would not be able to withdraw his plea, he would not have pled guilty and would have insisted on going to trial, as was required to show prejudice. ***State v. Coates***, 939 S.W.2d at 914. Nor did appellant plead that he would have withdrawn his plea had he been given the opportunity. And in fact, the court expressly asked appellant if he still wanted to plead guilty knowing that he faced a potential eight year sentence, and appellant said that he did (LF 53-54). Appellant has thus failed to allege facts showing a reasonable probability of a

different result if he had been informed that he would not be able to withdraw his plea. ***Strickland,*** 466 U.S. at 694, 104 S.Ct. at 2068.[6]

Appellant relies on ***State v. Thomas***, 96 S.W.3d 834 (Mo.App.W.D. 2002). In ***Thomas***, the Court of Appeals found that the trial court plainly erred in failing to grant the defendant's motion to withdraw his guilty plea because the defendant was not told that he would not be able to withdraw his plea after entering into a non-binding plea agreement. But ***Thomas*** involved a direct appeal from the denial of a motion to withdraw a guilty plea. In the present case, appellant never moved to withdraw his guilty plea. Rather, he filed a postconviction motion, and thus the burden was on him to plead and prove facts showing both error and prejudice. And while appellant pled that he did not understand that the state's recommendation was not binding, he did not plead that he would not have pled guilty and gone to trial had he been informed that the recommendation was not binding. Nor did appellant plead

[6] For example, in ***Dodson v. State***, 364 S.W.3d 773 (Mo.App.W.D. 2012), the movant's plea was found involuntary because the court did not advise appellant that his plea under Rule 24.02(d)(1)(B) could not be withdrawn, but in that case, the movant testified that if he had been advised he would not be able to withdraw his plea, he would not have pled guilty and would have insisted on trial. ***Id.*** at 776.

that he would have withdrawn the plea if given the opportunity. Appellant's pleadings fell short of that necessary to warrant an evidentiary hearing or relief.

Appellant also relies on ***Brown v. Gammon***, 947 S.W.2d 437 (Mo.App.W.D. 1997), a *habeas corpus* case in which the court found that the defendant's plea was based on a mistake of fact because, at the sentencing hearing, the trial court offered to sentence appellate to the 12 years agreed upon in the plea agreement or twenty years under the 120-call back provisions of §559.115. ***Id.*** at 439. Appellant agreed to the trial court's proposal for twenty years and possible probation, but ultimately appellant did not receive probation, at which point he brought his habeas petition, claiming his plea rested on the trial court's promise to release him after 120 days if he completed the substance abuse program. ***Id.*** at 440-441. The Western District found Mr. Brown's belief that he would get probation was reasonable given that it was never explained to him that probation was within the trial court's discretion. ***Id.*** at 441. Since Mr. Brown's plea was based on a reasonable mistake of fact, he should have been permitted to withdraw his plea.

Unlike ***Brown,*** in the present case, appellant's plea was not premised upon a reasonable mistake of fact. While the record in ***Brown*** showed that Mr. Brown accepted the court's sentencing terms because he thought he

would get probation, in the present case, it is clear from the language of the plea petition and the plea colloquy that appellant's plea was not based on a mistaken belief that he had a binding agreement for three years, in that appellant was clearly told that he faced the potential of eight years and yet he confirmed that, even in light of a possible eight years, he still wanted to plead guilty.

Appellant has failed to plead that he would not have pled guilty had he been told he could not withdraw his plea. He has failed to plead that he would not have pled guilty if it had been explained to him that the state's recommendation was non-binding. And appellant's statements in the plea petition and plea hearing refute any notion that appellant thought he had a binding plea agreement for three years on each case and that he was pleading guilty in reliance on this belief. Appellant expressly stated he knew that the sentence he received was solely a matter within the control of the Judge, that he was prepared to accept any punishment permitted by law which the court saw fit to impose (LF 45), and that he understood that the trial court could sentence him to as much as eight years, but it was still his intention to plead guilty. Given the record of the plea and appellant's postconviction pleadings, the motion court did not clearly err in denying appellant's motion without an evidentiary hearing.

III.

The motion court did not clearly err in denying appellant's claim that plea counsel was ineffective for failing to explain to him that the plea agreement was non-binding (in response to Appellant point II).

Appellant contends that plea counsel was ineffective because she failed to explain that the plea agreement was actually a mere recommendation that the court was not required to follow (App.Br. 23). Appellant asserts that this induced him to plead guilty (App.Br. 23). Appellant maintains that his claim was not refuted by the record (App.Br. 23).

A. Standard of review.

Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are "clearly erroneous." ***Woods v. State***, 176 S.W.3d 711, 712 (Mo.banc 2005). Supreme Court Rule 24.035(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. ***Id.*** On review, the motion court's findings and conclusions are presumptively correct. ***Storey v. State***, 175 S.W.3d 116, 125 (Mo. banc 2005).

To show ineffective assistance of counsel, appellant must show that his counsel "failed to exercise the customary skill and diligence that a reasonably

competent attorney would perform under similar circumstances," ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and that he was prejudiced by his counsel's failure to competently perform. ***Id.*** Prejudice exists when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. ***Strickland,*** 466 U.S. at 694, 104 S.Ct. at 2068. The benchmark for judging ineffectiveness is whether counsel's conduct so undermined the adversarial process that the trial cannot be relied upon as having produced a just result. ***Deck v. State***, 68 S.W.3d 418, 425 (Mo.banc 2002).

Where a defendant pleads guilty, claims of ineffective assistance of counsel are only relevant as they affect the voluntariness and understanding with which the plea was made. ***Hicks v. State***, 918 S.W.2d 385, 386 (Mo.App. E.D. 1996). To show prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. ***State v. Coates***, 939 S.W.2d 912, 914 (Mo.banc 1997).

The motion court is not required to grant a movant an evidentiary hearing unless (1) the movant pleads facts, not conclusions, which if true would warrant relief, (2) the facts alleged are not refuted by the record, and (3) the matters complained of resulted in prejudice to the movant. ***Coates v. State***, 939 S.W.2d at 913. The purpose of an evidentiary hearing is not to

provide movant with an opportunity to produce facts not alleged in the motion, but is to determine if the facts alleged in the motion are true. ***White v. State***, 939 S.W.2d 887, 904 (Mo. banc 1997), *cert. denied*, 522 U.S. 948, 118 S. Ct. 365, 139 L. Ed. 2d 284 (1997).

B. Relevant facts.

In appellant's First Amended Motion, counsel purportedly incorporated appellant's *pro se* motion (LF 15).[7] In appellant's *pro se* motion, appellant pled that he was promised a sentence of probation to three years by counsel and that counsel told him she had reached an agreement with the prosecutor (LF 7, 12). But when appellant arrived at court, defense counsel and the prosecutor proceeded as if appellant were making an open plea (LF 12). Appellant pled that he had no knowledge that he was making an open plea, and his plea bargain was never rejected in open court (LF 12). Appellant pled that as a result, he received an eight year sentence (LF 12).

In his First Amended Motion, appellant pled that the parties had entered into a plea agreement where the state agreed to a three year cap on

[7] According to appellant's First Amended Motion, the pro se motion was "attached hereto and incorporated by reference" (LF 15), but the legal file itself does not indicate that the pro se motion was, in fact, physically attached to the First Amended Motion.

each case with the sentences to run concurrently, while appellant was free to argue for a lesser sentence, including probation (LF 15). Appellant pled that the trial court violated Rule 24.02(d)(4) when it failed to inform the parties that the court had rejected their plea agreement (LF 16). Appellant also pled that the trial court violated Rule 24.02(d)(4) when it failed to afford appellant the opportunity to withdraw his guilty plea (LF 16).

Appellant further pled in his First Amended Motion that he received ineffective assistance of counsel because plea counsel failed to accurately state the plea agreement to the court, particularly that the sentences were to run concurrently (LF 16). Counsel was also allegedly ineffective for failing to thoroughly explain that the trial court was free to reject the plea (LF 16). Appellant pled that his knowledge of what the court could do with reference to the plea was incomplete, and counsel's omission affected the voluntary nature of his plea (LF 16). Finally, appellant pled that counsel was ineffective for failing to inquire of the court or to object to the court's imposition of two consecutive four year sentences (LF 17). Appellant asserted that counsel's failure to make sure that the plea agreement was relayed correctly to the Court or that the Court correctly understood the terms of the plea agreement rendered his plea involuntary (LF 17).

Appellant, in his brief, also cites to his pleadings in his Second Amended Motion (App.Br. 24-25). But, as discussed in Point I, ***supra,*** the

Second Amended Motion was not properly before the motion court. Any hearing on appellant's claims "shall be confined to the claims contained in the last timely filed motion." Rule 24.035(i). The last timely filed motion in the present case was the First Amended Motion filed by appellant's initial appointed counsel. Thus the motion court only had the authority to consider appellant's claims as pled in the First Amended Motion.

C. Analysis.

To show ineffective assistance of counsel, appellant must show that his counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances," ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and that he was prejudiced by his counsel's failure to competently perform. ***Id.*** Where a defendant pleads guilty, claims of ineffective assistance of counsel are only relevant as they affect the voluntariness and understanding with which the plea was made. ***Hicks v. State***, 918 S.W.2d 385, 386 (Mo.App. E.D. 1996). To show prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. ***State v. Coates***, 939 S.W.2d 912, 914 (Mo.banc 1997). The reviewing court need not address both prongs of ***Strickland*** if the movant has failed to make a sufficient showing on one. ***Taylor v. State***, 382 S.W.3d 78, 81 (Mo.banc

2012), citing ***Strickland*** at 697. If the ineffectiveness claim can be disposed of because of lack of sufficient prejudice, that course should be followed. ***Taylor, supra***, *citing* ***Strickland*** at 697.

In the present case, appellant failed to plead facts which, if true, demonstrated prejudice. Nowhere in appellant's pro se or first amended motion did he plead that but for counsel's alleged ineffectiveness, he would not have pled guilty and would have insisted on going to trial.[8] To show prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. ***State v. Coates***, 939 S.W.2d at 914. Not only did appellant make no such pleadings, but the record of the plea hearing also showed that he wanted to plead guilty despite knowing that he could be sentenced to eight years:

> Q. (By the Court) . . . . That means the maximum that I could possibly impose would be eight. Now, I'm not saying I'm

[8] Appellant, in his brief, cites to page 28 of the legal file to assert that he alleged that he would not have pled guilty but would have insisted on going to trial. But this allegation was in the second amended motion which, as discussed in Point I, ***supra***, was not properly before the motion court and cannot be considered.

going to do that, but today I can't promise that I won't. Do you understand that?

A. Yes, sir.

Q. Because what I need to find out is what's going on with you and what's going on – what are the exact circumstances of these charges and we're not set up to do that today. I'm going to order a sentencing assessment report, bring you back here in March and then I'll know and we'll all talk about it. Do you understand that?

A. Yes, sir.

Q. But it could be as much as eight years. Do you understand that?

A. Yes, sir.

Q. *Understanding that, is it still your intention to plead guilty to these charges?*

A. *Yes, sir.*

(LF 53-54) (emphasis added). Thus, inasmuch as appellant failed to plead that he was prejudiced, and inasmuch as the record of the guilty plea refutes any claim that he would not have pled guilty but would have insisted on going to trial, appellant was not entitled to an evidentiary hearing, assuming

his claim was properly before the motion court. Appellant's claim is thus without merit and should be denied.

Appellant, in his brief, cites to page 28 of the legal file to assert that he did allege that he would not have pled guilty but would have insisted on going to trial (App.Br. 28-29). But this allegation was in appellant's second amended motion which, as discussed in Point I, ***supra***, was not properly before the motion court and cannot be considered.

Finally, appellant notes that the plea court failed to question appellant regarding the effectiveness of his counsel as required by Rule 29.07(b)(4) (App.Br. 29). But the plea court's failure to question appellant does not "necessitate" remand for an evidentiary hearing, as appellant suggests (App.Br. 29). Inasmuch as the conviction and sentencing are complete before any inquiry is made under Rule 29.07, whether or not the inquiry occurs cannot be said to have affected the voluntariness of the defendant's plea. Appellant has pled no allegations which indicate that the failure to conduct such an inquiry affected the voluntariness of his plea or his right to effective assistance of counsel. Appellant has raised no issue before the motion court as to the plea court's failure to conduct a Rule 29.07 inquiry. And respondent is not aware of any authority which requires remand for an evidentiary hearing where the plea court has failed to conduct a Rule 29.07(b)(4) inquiry.

In sum, appellant's claim that counsel was ineffective for failing to advise him that the plea agreement was non-binding is without merit because appellant has failed to plead facts demonstrating that he was prejudiced and the record of the plea reflects that he pled guilty even though he knew that the court could sentence him to more than the state's recommendation. Appellant's claim is thus without merit and should be denied.

CONCLUSION

In view of the foregoing, the denial of appellant's Rule 24.035 motion, without an evidentiary hearing, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 9,221 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 20 day of June, 2012, to:

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/s/ Karen L. Kramer
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